STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2014
v	No. 313883 Chippewa Circuit Court
KIRK WAYNE LABADIE, Defendant-Appellant.	LC No. 12-000773-FH

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his conviction for assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 10 to 30 years' imprisonment. Because there was no prosecutorial misconduct and no error relating to defendant's sentencing, we affirm.

The victim and defendant were living together at the time of the assault. According to the victim, defendant came home at about 2:00 a.m. and an argument ensued. The argument escalated and turned violent. In particular, while the victim was on the bed, defendant jumped on top of her and began punching her in the head and face. He then began strangling her. During the assault, defendant told the victim that he was going to "rip [her] face off" and "kill [her] with his bare hands." The victim testified that she bit defendant's thumb when it was in her mouth, she scratched him, and tried to kick him off her. She said that she was finally able to grab defendant's genitals and force him off. She then called 911.

Defendant argues on appeal that the prosecutor engaged in misconduct that denied him a fair trial by arguing facts not in evidence during closing arguments and by asking defendant to comment on the credibility of a prosecution witness. Defendant raised no objection below, meaning the claims are unpreserved. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Under this standard, reversal is warranted if the defendant proves the following: (1) there was an error, (2) the error was clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if plain error is found, reversal is not required unless the error seriously affected the integrity of the judicial system or resulted in the conviction of an actually innocent person. *Id.* at 763-764. Further, in the context of prosecutorial misconduct, "we cannot find error requiring reversal

where a curative instruction could have alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Claims of prosecutorial misconduct are evaluated on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Challenged arguments made by a prosecutor must be considered as a whole in light of all the facts, including the defense arguments and how the comments relate to the evidence presented. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Otherwise improper remarks by the prosecutor may not require reversal if the remarks "address issues raised by defense counsel." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). And, although the prosecutor is prohibited from arguing facts that are not in evidence, *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001), the prosecutor is free to argue any reasonable inference that may arise from the evidence, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

During closing arguments, defense counsel argued that defendant was arrested for domestic assault. Defense counsel then argued "[t]he only person [who] decided that it was great bodily harm was the prosecutor who is [the] only one who actually [defendant] said horrible things about on the CD." During rebuttal, the prosecutor responded:

> Just briefly the police officers every day lodge people, that means they take them to the jail after they are being arrested. The person is held pending what is called an arraignment. Before the arraignment, as Office[r] Kaczmarek noted, the prosecutor reviews the case and the prosecutor is the only party that can actually charge someone. If we didn't charge him he would have gone free. We make the charging decision, our office. They were made within a day or two, I think a day of this assault, well before [defendant] made all the statements about me.

Defendant maintains that the prosecutor committed misconduct by discussing who made the charging decisions, thereby arguing facts not in evidence and implying that the prosecutor had special knowledge regarding the case. We disagree.

The prosecutor's comments were responsive to defense counsel's argument and based on evidence offered at trial. Defense counsel plainly argued that defendant should only have been charged and convicted with domestic assault, stating that the "only person" in law enforcement who saw the incident as more than a domestic assault was the prosecutor. The unspoken—but clearly implied—conclusion was that the prosecutor had abused her authority by overcharging defendant out of spite or some similar improper motivation. In response to this argument from defense counsel, the prosecutor explained to the jury that it is in the province of the prosecution and not the arresting officers to bring a criminal charge, meaning that, in this case, it was the prosecutor's duty to determine the proper charges, not the police. This argument was a permissible response to defense counsel's arguments and it was based on evidence offered by a police officer who testified that, after the police arrest someone, it is for the prosecutor to review the case and decide the proper charges. Thus, we see no prosecutorial misconduct in these remarks. Moreover, even assuming some impropriety, reversal is not required because any prejudicial effect could have been alleviated by a timely objection and curative instruction, *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008), and, by instructing the jury

that the lawyers' statements were not evidence, the trial court did in fact alleviate any potential prejudice. See *id.*; *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has not shown plain error entitling him to relief.

Defendant also argues that the prosecutor committed misconduct by forcing defendant to comment on the credibility of Jeffrey Bender, M.D., the physician who treated the victim at the emergency room. Witness credibility determinations are the province of the jury. *People v Musser*, 494 Mich 337, 348-349; 835 NW2d 319 (2013). Because the jury is responsible for determining the credibility of a witness, "it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial." *Id.* at 349. Consequently, when a defendant testifies on his own behalf, the prosecutor is generally precluded from asking the defendant to comment on the credibility of a prosecution witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, if a defendant chooses to testify, his or her credibility, like that of any other witness, can be tested and impeached. *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995).

According to Bender's trial testimony, the victim had swelling around her left eye, her left jaw, and in the temporal area of the left side of her head. Bender also noted redness, or early bruising, around her neck and the left side of her face. Bender said that a significant force would have had to be used to cause the amount of swelling he noted and to create bruising so soon after the incident. Bender said that the victim's injuries were consistent with strangulation.

The following exchange then occurred during cross-examination of defendant:

> *Q.* . . . You had an opportunity to talk or hear Dr. Bender?
>
> *A.* Yes, I did.
>
> *Q.* Testify and he testified that it would have to have taken very significant force to cause the types of injuries that he saw on [the victim]; did you hear that?
>
> *A.* Yes.
>
> *Q.* Specifically, there was very significant force to the temporal area, right?
>
> *A.* I suppose.
>
> *Q.* And very significant force applied to the jaw area, right, too?
>
> *A.* Yes.
>
> *Q.* And there was very significant force applied to her neck, too, wasn't there, according to the doctor?
>
> *A.* Might have been, yes, might have been?

Q. He doesn't have any reason to lie about what injuries [the victim] sustained?

A. No, not at all.

Q. He said the force that was applied to her neck had to be of such significance that it stopped her circulation and the blood flow to her brain to cause the petechia you see by her eye; did you hear that?

A. Yes, I did.

Taken in context, the prosecutor's questioning was not meant to impermissibly force defendant to comment on Bender's credibility. Instead, the prosecutor sought to establish that defendant's version of the incident was inconsistent with medical testimony on the nature of the injuries inflicted and their likely cause. In other words, the prosecutor's questioning was a challenge to the credibility of defendant's testimony. Given that the prosecutor could attack defendant's credibility as she would any other witness, there was no prosecutorial misconduct in her questioning defendant in this manner. See *Fields*, 450 Mich at 110. Moreover, even if the questions were improper, any prejudicial effect could have been alleviated by a timely objection and curative instruction, and thus defendant is not entitled to relief on appeal. *Unger*, 278 Mich App at 235.

Next, defendant argues that, during sentencing, the trial court engaged in fact-finding beyond those established by the jury's guilty verdict in violation of *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). This argument was rejected in *People v Herron*, 303 Mich App 392, 405; ___ NW2d ___ (2013) (citation omitted), wherein this Court held that *Alleyne* did not impact Michigan's indeterminate sentencing scheme because "judicial fact-finding to score Michigan's guidelines falls within the 'wide discretion' accorded a sentencing court 'in the sources and types of evidence used to assist [the court] in determining the kind and extent of punishment to be imposed within limits fixed by law.'" Given this Court's decision in *Herron*, defendant's argument is without merit. He has not shown any sentencing error and he is not entitled to relief.

Finally, defendant argues that offense variable (OV) 7 was improperly scored. In particular, defendant argues that his conduct did not go beyond the minimum required to commit the offense. This issue is unpreserved. "[A]n unpreserved objection to the scoring of offense variables is reviewed for plain error." *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007).

MCL 777.37(1)(a) indicates that OV 7 is to be scored at 50 points when "[a] victim was treated with sadism, torture, or excessive brutality or conducted designed to substantially increase the fear and anxiety a victim suffered during the offense." There are thus four categories of conduct for scoring OV 7. See *People v Hardy*, 494 Mich 430, 439-440; 835 NW2d 340 (2013). To make such a determination under the last category, courts must consider: "(1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id.* at 443-444.

The elements of AWIGBH are "an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (citation omitted). Considering these elements, it is plain that defendant went beyond the minimum conduct required to commit the offense. Defendant beat the victim, punching her at least 10 times and repeatedly choking her until she could not breathe, all the while threatening to kill her "with his bare hands." He caused actual injury to her face and neck as a result of his attack and, indeed, medical testimony indicated that it would have taken "significant force" to cause such extensive swelling and bruising so soon after the assault. This high level of force and extensive violence was not necessary to a conviction for AWIGBH. Under these circumstances, we discern no plain error.[1]

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter

[1] Having concluded that OV 7 was appropriately scored on this basis, we need not address the prosecution's contention that defendant's conduct qualifies as "excessive brutality" within the meaning of OV 7.